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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

Supreme Court, U. S.
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No. 72-576

PHILIP A. ROBINSON, JACOB A. ROBINSON and KATE ROBINSON,

Petitioners,

vs.

DR. LLOYD W. McCORKLE, Commissioner, Individually and as Head of the Department of Institutions and Agencies; DR. RUFUS R. LITTLE, Individually and as Superintendent of Bergen Pines County Hospital; BERGEN PINES COUNTY HOSPITAL; RALPH W. CHANDLESS, Borough Attorney; HARRY H. CHANDLESS, JR., Municipal Magistrate; JOHN KAPHON, Clerk, Municipal Court; ARTHUR H. VAN HOUTEN, Chief of Police; CAPT. WILLIAM D. NOONAN; SGT. HOWARD R. BAKER, JR.; SGT. EUGENE F. DATES; SGT. GIRARD K. DOMMENGE; PTL. PETER A. BRUINOOGE; PTL. BRUCE H. WERNER; SGT. HARRY P. CARTY, JR.; PTL. DONALD E. WORSTER; PTL. WILLIAM H. BISCHOFF; Ex-Chief HARRY P. CARTY, SR.; Ex-PTL. JOHN W. RUROEDE, JR., Individually and as Police Officers,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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No.

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vs.

DR. LLOYD W. McCORKLE, Commissioner, Individually and as Head of the Department of Institutions and Agencies; DR. RUFUS R. LITTLE, Individually and as Superintendent of Bergen Pines County Hospital; BERGEN PINES COUNTY HOSPITAL; RALPH W. CHANDLESS, Borough Attorney; HARRY H. CHANDLESS, JR., Municipal Magistrate; JOHN KAPHON, Clerk, Municipal Court; ARTHUR H. VAN HOUTEN, Chief of Police; CAPT. WILLIAM D. NOONAN; SGT. HOWARD R. BAKER, JR.; SGT. EUGENE F. DATES; SGT. GIRARD K. DOMMENGE; PTL. PETER A. BRUINOOGE; PTL. BRUCE H. WERNER; SGT. HARRY P. CARTY, JR.; PTL. DONALD E. WORSTER; PTL. WILLIAM H. BISCHOFF; Ex-Chief HARRY P. CARTY, SR.; Ex-PTL. JOHN W. RUROEDE, JR., Individually and as Police Officers,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Introductory Paragraph

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on June 12, 1972 which affirmed the judgment of the United States District Court, for the District of New Jersey, entered on February 10, 1971, dismissing the complaint as to certain named defendants and dropping two of the plaintiffs.

Opinions Below

The opinion of the Circuit Court of Appeals, filed June 12, 1972 is not yet reported. It will be found in the Appendix, 1a infra. The opinion of the District Court dated December 14, 1970, likewise not reported, will be found in the Appendix, 12a infra. Opinion of three-judge court dated and filed June 8, 1972, in companion appeal in this matter, designated 72-506 before this Court, will be found in Appendix 25a, infra.

Jurisdictional Ground

(i) The judgment of the Court of Appeals (9a) infra, was entered on June 12, 1972.

(ii) On August 10, 1972, Mr. Justice Brennan signed an order extending the time for filing this petition for writ of certiorari, to and including October 10, 1972 (11a). This petition for certiorari is being filed within the extended time.

(iii) The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

Questions Presented

This case is brought under 42 U.S.C. 1983, seeking damages, a declaratory judgment and injunctive relief, arising out of a conspiracy to violate the civil rights of petitioners.

The questions presented here which were incorrectly resolved by the Court of Appeals, relate to the dismissal of the complaint against certain named defendants and eliminating two of the petitioners. These questions are:

1. Whether, the district judge has constitutional power or authority under Rule 56 or any other rule to dismiss complaint as to named respondents without first giving petitioners an opportunity to commence and conclude the depositions of the defendants, and to complete other pretrial discovery of respondents which are an important factor.

2. Whether the district judge below improperly construed the intent of the Civil Rights Act when, as to some respondents, alleged to be a part of the conspiracy, he dismissed the amended complaint on the ground that they had immunity from suit under the law.

3. Whether the complaint lacked specificity against other respondents thereby justifying dismissal?

4. Whether the district court failed to take cognizance that the constitutional rights of the Robinson parents were violated by the respondents.

5. Whether the Court of Appeals in affirming the dismissals fell into the same error.

Constitutional and Statutory Provisions Involved

The constitutional provisions which are relevant to the decision of this case are: First, Fourth, Fifth, Sixth, Ninth and Fourteenth Amendments to the United States Constitution, all set out in the Appendix.

Federal Statutes: 28 U.S.C. Sec. 1254(1), 1343(1); 42 U.S.C. Secs. 1983, 1984 and 1985; New Jersey Statutes N.J.S. 30:4-16, 30:4-26.1 (Repealed), 30:4-26.3, 30:4-30; Federal Rules of Civil Procedure 8(a)(2), 12(c), 56(a), 56(c). The constitutional text, statutes and rules are set out in the appendix herein, beginning at 32a.

Concise Statement of the Case

This petition seeks to review a judgment dated June 12, 1972, of the Court of Appeals, which affirmed a dismissal of the complaint, by the district judge as against certain named respondents and the dismissal of the complaint as to two of the named petitioners. See, District Court judgment dated February 10, 1972, Appendix 12a, infra.

On two separate occasions, April 18, 1968 and November 6, 1969, Philip A. Robinson was arrested without warrant, by a group of policemen acting under orders of Ralph W. Chandless, the political boss of Hasbrouck Heights. Following such arrest, Harry H. Chandless, Jr., a nephew-magistrate of this boss, committed Philip A. Robinson to the criminally insane ward of Bergen Pines County Hospital under an emergency statute, N.J. S.A. 30:4-26.3, now under attack before this Court in No. 72-506. That institution received him without proper legal authority.

Petitioners allege that these commitments were part of a conspiracy to eliminate from the local political scene of

Hasbrouck Heights, Jacob A. Robinson, father of plaintiff Philip A. Robinson, a dissident and a political foe of this political boss, Ralph W. Chandless.

Suit was instituted in the United States District Court for the District of New Jersey, Civil 1501-69, on December 16, 1969, by filing a verified complaint seeking a declaratory judgment, damages for violation of civil rights and an injunction against executing four warrants for the arrest of Philip A. Robinson. An order to show cause issued on December 24, 1969. On or about January 5, 1970, the return day of the order to show cause for temporary restraint, affidavit and brief were filed by the Hasbrouck Heights respondents. The other respondents relied on these same affidavits and brief without filing any supplemental affidavits or brief. In the course of the argument, Ralph W. Chandless, then counsel to Hasbrouck Heights, as such counsel and on his own behalf, represented to the District Court that neither his clients nor he had any intention of executing these four outstanding warrants for Philip A. Robinson's arrest. Whereupon, the petitioners withdrew their application for an injunction.

Thereafter, and on July 22, 1970, an amended complaint was filed with some minor changes, but which substantially followed the earlier complaint.

Without setting out under which rule they were proceeding, motions were thereafter made in August 1970 by all of the respondents, for judgment on the pleadings, returnable on October 26, 1970, relying only on Hasbrouck Height's brief in connection with the order to show cause why injunction should not issue. It would appear that the motion was made under Rule 12(c) of Federal Rules of Civil Procedure for the United States District Courts. The district judge treated the motion as being one for summary judgment under Rule 56(c), by considering the Has-

brouck Heights respondents' affidavit filed under the aforesaid order to show cause, and reserved decision. On February 10, 1971, order was made by the district judge granting respondents' motion to dismiss the amended complaint in part and denying it in part.

After the decision on this motion a Second Amended Complaint followed on February 26, 1971 which sought a declaratory judgment from a three-judge court to hold the emergency commitment statute N.J.S. 30:4-26.3 unconstitutional.

State Court Judgment Not Involved

Jurisdiction of the District Court

Jurisdiction was invoked under 28 U.S.C. 1343(1).

Reasons for Granting the Writ of Certiorari

The Court of Appeals has sanctioned the departure by the district court from accepted and usual course of judicial proceedings, in that:

1. On the motion to dismiss the complaint, the trial court could not consider the affidavits of respondents filed against the application for a preliminary injunction, because, as the record shows, this application for an injunction was withdrawn by the petitioners. When that happened the affidavits were also impliedly withdrawn. They had lost their vitality and had become *functus officio*. *Wiley* v. *Northern P.R. Co.*, 60 Wash. 597, 111 P. 801, 802 (Sup. Ct. Oklahoma 1910). The appellate court fell into the same error.

2. An injunction application cannot be equated with a motion to dismiss and the affidavits procedurally valid in

opposition to an injunction could only be used as an admission in a subsequent suit but not as a self-serving declaration. The two proceedings are entirely different. *Mead* v. *Randall*, 111 Mich. 268, 69 N.W. 506, 508 (Sup. Ct. 1896).

3. The "procedure in equity" is that affidavits used on other motions for preliminary restraint cannot be recycled, but have spent themselves. Rose, Federal Jurisdiction and Procedure (4th Edition 1931) Section 573, p. 501. The consideration by the courts below of these spent affidavits has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

4. The action of the courts below in this partial dismissal of the complaint, before depositions had been taken of the respondents and other discovery by the appellants completed, was premature and denied petitioners procedural due process.

5. Such dismissal nullified and endangered a time-honored practice of not considering dismissal during the discovery stage of the proceedings and went counter to the guidelines laid down in the dissenting opinion of the late Mr. Justice Black, joined in by Chief Justice Warren and Mr. Justice Brennan. *First National Bank* v. *Cities Service Co.*, 391 U.S. 253, 299 (1968). The uncertainty and the confusion bred by this action, so sweepingly taken below, requires immediate resolution in the public interest and a reversal of the courts' judgment.

6. Long established constitutional standards of adjudication on discovery issues were ignored by the courts below and went against the holding of The Advisory Committee on Federal Rules, which observed that: "summary adjudications as a general proposition, are undesirable." Moore's Rules Pamphlet, (Ed. of 1971) p. 934.

7. The amended complaint alleged conspiracy of the respondents under the Civil Rights Act, 42 U.S.C. Sec. 1983. The respondent sought dismissal of the complaint alleging a want of any conspiracy. Reversing proper procedure, the courts below held the complaint lacked "specifics" and granted partial dismissal of the complaint. Had the courts followed *Adickes* v. *Kress & Co.*, 398 U.S. 144, 160 (1970), the holding should have been that the respondents must establish the *absence* of a genuine issue by alleging facts under oath, to counteract petitioners' allegations of conspiracy. Absent such affidavits, petitioners had a right to rely on the affirmative allegations of their complaint.

8. By applying the "specifics" approach the district judge, sanctioned by the Court of Appeals, employed a discredited technique. He sought but could not find a formal agreement among the conspirators. Therefore, he dismissed. Overlooked by him was the conspiracy case involving the antitrust laws. *Norfolk Monument Company, Inc.* v. *Woodland Memorial Gardens, Inc.*, 394 U.S. 700, 704 (1969). There, this court rejected that concept for the circumstantial evidence approach holding "where motive and intent play leading roles (and) the proof is largely in the hands of the alleged conspirators," finding of an "agreement" was unnecessary. See, also, *American Tobacco Co.* v. *United States*, 328 U.S. 781, 809, 810, (1946) holding "no formal agreement is necessary to constitute an unlawful conspiracy."

9. The magistrate respondent, as to whom the complaint was dismissed came within the "every person" part of section 1983, *Bradley* v. *Fisher*, 13 Wall 335 (1872) relied on by respondents, to the contrary notwithstanding. *Bradley* was not a civil rights case. See, Dissenting opinion Mr. Justice Douglas in *Pierson* v. *Ray*, 386 U.S. 547, 559 (1967). Also, in *Pierson*, there was no proof that the

judge played any role in the arrests or convictions other than to adjudge plaintiffs guilty when their cases came before his Court. *Id.* at p. 553. Thus the Supreme Court indicated that a judge may be liable if proof of conspiracy can be established.

The "under color of law" phrase does apply to this respondent for he misused his power, deprived petitioner Philip A. Robinson of his liberty, denied him a hearing before commitment, and denied him due process. It applies to unconstitutional actions taken with or without state authority. *Monroe* v. *Pape,* 365 U.S. 167, 172 (1961) at p. 172. *Picking* v. *Pennsylvania R. Co.,* 151 F. 2d 240, 250 (3d Cir. 1945). Finally, in a Note: 79 Yale L. Rev. 322, 337, Liability of Judicial Officers under Section 1983, concludes that there is no adequate rationale—in history or policy—for altogether exempting judicial officers from liability.

10. The borough attorney-respondent Ralph W. Chandless having been sued in his individual capacity had no immunity. *Kauffman* v. *Moss,* 420 F. 2d 1270 (3d Cir. 1970). Even if this respondent were a prosecutor, here seriously denied, when acting outside the scope of his jurisdiction he is liable in a private action under the Civil Rights Act. *Lewis* v. *Brautigan,* 227 F. 2d 124 (C. A. Fla. 1955); *Rouselle* v. *Perez,* 293 F. Supp. 298 (D. C. La. 1968). *Henig* v. *Odorioso,* 385 F. 2d 491, 494 (3d Cir. 1967) relied on by the trial judge is distinguishable, in that in *Henig* the district attorney was executing judicial orders. The respondent's status as a licensed attorney representing the borough did not make him an officer of the State and he is thus liable as any other individual. *Pugliano* v. *Staziak,* 231 F. Supp. 347, 351 (1964) aff'd per curiam, 345 F. 2d 797 (3d Cir. 1965); *Basista* v. *Weir,* 225 F. Supp. 619 (1964) was reversed in 340

F. 2d 74 (3d Cir. 1965) and a new trial granted because of prejudicial errors at the trial. Even if Ralph W. Chandless were acting in a supervisory capacity over the prosecutor, he could not change his character as that of an individual liable for his acts, when using his office to accomplish an unlawful purpose. *Rouselle* v. *Perez, supra* at p. 300. See, also, *Dombroski* v. *Eastland,* 387 U. S. 82 (1967) where the Court permitted suit against the chief counsel of the United States Senate Internal Security Subcommittee but not against its chairman, for acts allegedly committed in conspiracy with Louisiana State Officials which were condemned in *Dombroski* v. *Pfister,* 380 U. S. 479 (1965).

11. Bergen Pines County Hospital is undoubtedly a "person" which can sue and be sued under Section 1983, for equitable relief as well as money damages. If a school district can be sued in a civil rights case, where only the form of the relief was left to be determined, so can a hos-cipal Corporation May Be Sued For Equitable Relief Un-393 U. S. 503 (1969); *Harkless* v. *Sweeney Independent School Dist.,* 427 F. 2d 319 (5th Cir. 1970); *Porcelli* v. *Titus,* 302 F. Supp. 726, 730 (D. C. N. J. 1969). A county hospital has been held not to be a municipal corporation and suable. *Kress* v. *Newark,* 8 N. J. 562 (1950). In a note: 70 Columbia L. Rev. 1467, 1474 (1970) a Municipal Corporation May Be Sued For Equiable Relief Under the Civil Rights Act, Sec. 1983. *Monroe* v. *Pape,* supra, at p. 187 (1961) did not involve a county hospital. Finally the claimed sovereign immunity, if Bergen Pines had any, ended when its insurance carrier came in and defended its acts, as it has done down to now.

12. The Third and Fourth Causes of Action were strike-proof. The breaking, entering and searching of the home of the Robinsons, without a warrant violated their Fourth

Amendment rights and brought them within *Mapp* v. *Ohio*, 367 U. S. 643 (1961). The harassment and conspiratorial acts of the respondents drove the Robinsons to move from Hasbrouck Heights and resulted in Jacob A. Robinson being denied his rights to express his dissent and run for public office, both being protected under the First and Ninth Amendments to the United States Constitution. cf. *Dombroski* v. *Pfister, supra* at p. 490 (1965).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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[APPENDIX FOLLOWS]

APPENDIX

Opinion of the United States Court of Appeals For the Third Circuit

(Filed—June 12, 1970.)

Nos. 71-1301—71-1303

PHILIP A. ROBINSON, JACOB A. ROBINSON, and KATE ROBINSON, his wife

v.

DR. LLOYD W. MCCORKLE, Commissioner of the Department of Institutions and Agencies, DR. RUFUS R. LITTLE, Supt. of Bergen Pines County Hospital, BERGEN PINES COUNTY HOSPITAL, RALPH W. CHANDLESS, Borough Attorney, HARRY H. CHANDLESS, JR., Municipal Magistrate, JOHN KAPHON, Clerk, Municipal Court, ARTHUR H. VAN HOUTEN, Chief of Police, CAPT. WILLIAM D. NOONAN, SGT. HOWARD R. BAKER, JR., SGT. EUGENE F. DATES, SGT. GIRARD K. DOMMENGE, PTL. PETER A. BRUINOOGE, PTL. BRUCE H. WERNER, SGT. HARRY P. CARTY, JR., PTL. DONALD E. WORCESTER, PTL. WILLIAM H. BISCHOFF, EX CHIEF HARRY P. CARTY, SR., EX-PTL. JOHN W. RUROEDE, JR.

PHILIP A. ROBINSON,

Appellant in No. 71-1301

JACOB A. ROBINSON,

Appellant in No. 71-1302

KATE ROBINSON,

Appellant in No. 71-1303

(D. C. Civil Action No. 1501-69)

Opinion of the United States Court of Appeals For the Third Circuit

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued March 14, 1972

Before ROSENN, ROSEN, *Circuit Judges,* and TEITELBAUM, *District Judge*

OPINION OF THE COURT

(Filed—June 12, 1972)

ROSEN, *Circuit Judge.*

Appellants seek review of a district court order dismissing their civil rights complaint brought under 42 U.S.C. §§1983, and 1985 (3) against certain named defendants.

The allegations of the amended complaint set forth numerous counts of unlawful conduct against various police officers of Hasbrouck Heights, Borough attorney, magistrate and clerk of the municipal court, commissioner of the New Jersey Department of Institutions and Agencies, superintendent of Bergen Pines County Hospital and the hospital itself. Severely distilled, the amended complaint makes the following contentions: (1) that petitioner was unlawfully committed to Bergen Pines County Hospital for temporary confinement on two occasions under a repealed New Jersey statute providing for summary commitments; (2) that warrants remain outstanding against Philip Robinson, sworn out by various named defendants and non-parties, which place him in fear of future unlawful commitments; (3) that the course of conduct engaged in by the defendants reveals a conspiracy

to discredit the appellant Philip and his family, and is the result of a concerted and deliberate effort to destroy the public reputation and character of the Robinson family.

The appellants requested $1.3 million special and punitive damages. The Robinsons also sought the convening of a three-Judge court to hear and determine the constitutionality of N.J.S.A. 30:4-26.3 (summary hearing and commitment statute) and Article I, Par. 9 of the New Jersey Constitution, and a judgment declaring the aforementioned statute and article of the Constitution unconstitutional.[1]

Judge Whipple's disposition of each count of the Robinsons' complaint was proper.

Count one was dismissed to all parties except Harry Carty, Sr., who was Chief of Police of the Hasbrouck Heights Police Department at the time of the alleged incidents, Dr. Rufus Little, superintendent of Bergen Pines County Hospital, and Dr. Lloyd McCorkle, commissioner of the New Jersey Department of Institutions and Agencies. In addition to these three defendants, the motion to dismiss count two against several defendants who are or were police officers employed by Hasbrouck Heights and alleged to have participated in the incidents preceding the two commitments was denied. The motion was granted to all other defendants on count two. Although the district judge found a lack of specific facts upon which to grant relief, *Negrich* v. *Hohn*, 379 F.2d 213 (3d Cir. 1967), *Kauffman* v. *Moss*, 420 F.2d 1270 (3d Cir. 1970), *cert. den.*

[1] The Robinsons challenge the constitutionality of Paragraph 9 of Article I which permits the Legislature to "authorize the trial of the issue of mental incompetency without a jury."

400 U.S. 846 (1970), his exercise of discretion in allowing Philip Robinson to pursue various charges of brutality and physical abuse against the remaining defendants was particularly appropriate at this juncture in the proceedings.

Dismissal in favor of the judge, borough attorney and clerk, on the basis of the pleadings, cannot be faulted. Not only are the conspiracy allegations unsupported by any specific facts, but the complaint fails to make a sufficient showing under 42 U.S.C. 1985(3) that Philip Robinson was denied equal protection of the law. With near unanimity, the courts have rejected complaints containing mere conclusory allegations of deprivations of constitutional rights protected under §1985(3). "A conspiracy claim based upon §1985(3) requires a clear showing of invidious, purposeful and intentional discrimination between classes or individuals. *Snowden* v. *Hughes*, 321 U.S. 1, 64 S. Ct. 397, 88 L. Ed. 497 (1944), *Hoffman* v. *Halden*, 268 F.2d 280 (9th Cir. 1959); *Colon* v. *Grieco*, 226 F. Supp. 414 (D. N.J. 1964); *Selico* v. *Jackson*, 201 F. Supp. 475 (S.D. Cal. 1962)." *Daly* v. *Pedersen*, 278 F. Supp. 88 (D. Minn. 1967); *Weise* v. *Reisner*, 318 F. Supp. 580, 583 (E.D. Wis. 1970). Cf. *Griffin* v. *Breckenridge*, 403 U.S. 88 (1970).

The judicial immunity doctrine also sustains the dismissals. Assuming *arguendo* that Philip Robinson was committed under a repealed statute, such judicial miscue does not remove the shield of immunity. Judge Whipple properly pointed to the essential distinction between "clear absence of jurisdiction" and "excess of jurisdiction." See *Bauers* v. *Heisel*, 361 F.2d 581, 591 (3d Cir. 1966) *cert. den.* 386 U.S. 1021 (1967); *Jacobson* v. *Schaefer*, 441 F.2d

127 (7th Cir. 1971); *Pritt* v. *Johnson*, 264 F. Supp. 167, 170 (M.D. Pa. 1967). Cf. *Wade* v. *Bethesda Hospital* (S.D. Ohio 1971), 9 Cr. L. 2526. In *Gaito* v. *Ellenbogen*, 425 F.2d 845 (3d Cir. 1970), we affirmed the dismissal of a state prisoner's civil rights complaint against four of the five named defendants, two state court judges, the Pennsylvania Attorney General, and the Pittsburgh District Attorney, insofar as these defendants were immune from suit as state officials. In *Lockhart* v. *Hoenstine*, 411 F. 2d 455 (3d Cir. 1969), a state prisoner brought an action for damages under 42 U.S.C.A. §1983 against a Prothonotary of the Superior Court of Pennsylvania for failure to accept certain papers for filing. The Prothonotary's motion for summary judgment was granted, and affirmed on appeal. The court noted that, "[I]n addition to the recognized immunity enjoyed by judicial and quasi-judicial officers, including prothonotaries, there exists an equally well-grounded principle that any public official acting pursuant to court directive is also immune from suit." We took counsel from *Ginsburg* v. *Stern*, 125 F. Supp. 596, 602 (W. D. Pa. 1954), aff'd. 225 F. 2d 245 (3d Cir. 1955), where the argument for civil liability was squarely faced.

> "Thus, assuming that the failure to file said petition was patently violative of complainant's civil rights, no basis in law exists whereby civil liability can be imposed upon a public official acting pursuant to court order and direction."[2]

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[2] In *Bauers* v. *Heisel*, 361 F. 2d 581 (3d Cir. 1966), *cert. den.* 386 U. S. 1021 (1967), we held that the Civil Rights Act of 1871 was not intended to abrogate the common law immunities enjoyed by members of the judiciary.

See also *Marcedes* v. *Barrett*, 453 F. 2d 391 (3d Cir. 1971), where a civil rights suit was filed against a battery of judicial personnel who performed judicial and quasi-judicial duties in connection with a state criminal proceeding. We affirmed the dismissal of the complaint on the bilateral grounds of judicial immunity and failure to allege specific facts in support of the conclusory allegations of the complaint.

Appellants would have us view the motions to dismiss as summary judgment motions, so that the burden of showing the absence of a genuine issue of fact rests on the movants. The trial judge properly treated the designated motions as motions to dismiss, and measured the allegations of the complaint against the rule of specificity of pleading applicable to civil rights actions.

Appellants allege error in the dismissal of the various claims against Bergen County Hospital, predicated on their disagreement with the trial judge regarding the hospital's amenability to suit as a "person" under § 1983. The main thrust of count 5 is to test the constitutionality of the New Jersey Summary Commitment Statute and Article I, Par. 9 of the New Jersey Constitution. No specific equitable relief is requested against Bergen Pines, in apparent recognition that there is no continuing conduct which may be enjoined or restricted. The same broad, conclusory allegations are made with respect to Bergen Pines as are made against the other defendants. We find the dismissal in favor of the hospital proper in all respects. See *United States ex rel. Gittlemacker* v. *County*

of Philadelphia, 413 F. 2d 84 (3d Cir. 1969), *cert. den.* 396 U. S. 1046 (1970).[3]

Counts three and four were properly dismissed for failure to establish a claim for relief. Philip Robinson's parents' claims of physical and emotional distress are not actionable under §§ 1983 or 1985 (3). We find no error in the court's disposition of these claims.

The parties remaining in this suit are the only defendants having any real connection, through specific acts, with the "true" allegations of the complaint. When

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[3] While the complaint contains counts for declaratory relief and the convening of a three judge court, the primary relief sought is the recovery of $1.3 million in exemplary and punitive damages for past completed wrongs. Appellants attempt to bring themselves within the purview of that line of cases where a civil rights suit was allowed against school boards seeking equitable relief. *Harkless* v. *Sweeny Independent School District,* 427 F. 2d 319 (5th Cir. 1970, cert. den. 400 U. S. 99 (1971); *Porcelli* v. *Titus,* 302 F. Supp. 726 (D. N. J. 1969), aff'd 431 F. 2d 1254 (3d Cir. 1970) *cert. den.* 402 U. S. 944 (1971). In *Harkless,* the claim for back pay was an integral part of the equitable relief for reinstatement, and not a count for "damages." In *Porcelli,* the plaintiffs alleged racial discrimination in the municipal school system in the appointment and promotion of teachers, in violation of the equal protection clause. We take our guide from *Monroe* v. *Pape,* 365 U. S. 167 (1961), and other cases where civil rights suits have been barred against municipalities for damages in respondeat superior situations. See *Mayhue* v. *City of Plantation,* 375 F. 2d 447 (5th Cir. 1967); *Harvey* v. *Sadler,* 331 F. 2d 387 (9th Cir. 1964). When read against the background of these decisions, appellants' arguments are rendered groundless. See also *Folk* v. *Wilson,* 313 F. Supp. 727 (D. Del. 1970); *Ransom* v. *City of Philadelphia,* 311 F. Supp. 973 (E. D. Pa. 1970); *Nugent* v. *Sheppard,* 318 F. Supp. 314 (N. D. Ind. 1970).

purged of its "windmills," the complaint allows the court below to go forward and hear evidence on the only justiciable claims contained thereon, outside of the spectacle of a "feudal" drama. We have reviewed the trial court's disposition of all counts, and find no substance to appellants' claims of error.

The judgment of dismissal will be affirmed.[4]

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

[4] We entertained jurisdiction of this appeal by virtue of Rule 54(b) F.R. Civ. Pr.

Judgment of the United States Court of Appeals For the Third Circuit

Nos. 71-1301/71-1303

PHILIP A. ROBINSON, JACOB A. ROBINSON, and KATE ROBINSON, his wife,

vs.

DR. LLOYD W. MCCORKLE, Commissioner of the Department of Institutions and Agencies, DR. RUFUS R. LITTLE, Supt. of Bergen Pines County Hospital, BERGEN PINES COUNTY HOSPITAL, RALPH W. CHANDLESS, Borough Attorney, HARRY H. CHANDLESS, JR., Municipal Magistrate, JOHN KAPHON, Clerk, Municipal Court, ARTHUR H. VAN HOUTEN, Chief of Police, CAPT. WILLIAM D. NOONAN, SGT. HOWARD R. BAKER, JR., SGT. EUGENE F. DATES, SGT. GIRARD K. DOMMENGE, PTL. PETER A. BRUINOOGE, PTL. BRUCE H. WERNER, SGT. HARRY P. CARTY, JR., PTL. DONALD E. WORSTER, PTL. WILLIAM H. BISCHOFF, EX CHIEF HARRY P. CARTY, SR., EX-PTL. JOHN W. RUROEDE, JR.,

PHILIP A. ROBINSON,

Appellant in No. 71-1301

JACOB A. ROBINSON,

Appellant in No. 71-1302

KATE ROBINSON,

Appellant in No. 71-1303

(D. C. Civil Action No. 1501-69)

Judgment of the United States Court of Appeals For the Third Circuit

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present:

ROSENN and ROSEN, *Circuit Judges* and TEITELBAUM, District Judge

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed February 10, 1971, be, and the same is hereby affirmed, with costs taxed against appellants.

ATTEST:

THOMAS P. QUINN
Clerk

June 12, 1972

Certified as a true copy and issued in lieu of a formal mandate on July 5, 1972.

Test:

THOMAS P. QUINN
Clerk, United States Court of Appeals
for the Third Circuit

Order Extending Time to File Petition for Writ of Certiorari

SUPREME COURT OF THE UNITED STATES

No. A-155

PHILIP A. ROBINSON, *et al.*,

Petitioners,

v.

LLOYD W. MCCORKLE, Commissioner of the Department of Institutions and Agencies, *et al.*

UPON CONSIDERATION of the application of counsel for petitioners,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 10, 1972.

S/ WILLIAM J. BRENNAN, JR.
Associate Justice of the Supreme Court of the United States

Dated this 8th day of August, 1972

Opinion of District Court

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

PHILIP A. ROBINSON, *et al.*,

Plaintiffs,

v.

LLOYD W. MCCORKLE, COMMISSIONER OF THE DEPARTMENT OF INSTITUTIONS and AGENCIES, *et al.*,

Defendants.

(Civil No. 1501-69)

Newark, New Jersey
December 14, 1970.

By:

The Honorable LAWRENCE A. WHIPPLE,
U.S.D.J.

Appearances:

FRANKEL & FRANKEL,
Attorneys for the Plaintiffs,
By: LEOPOLD FRANKEL, Esq.
JOSEPH T. MALONEY, *Esq.*, Deputy Attorney General
Attorney for defendant McCorkle.

HEIN, SMITH, MOONEY & BEREZIN,
Attorneys for defendant Bergen Pines Hospital and Dr. Rufus Little,
By: LAURENCE D. SMITH, Esq.

MILTON, KEANE & DEBONA,
Attorneys for defendant Borough of Hasbrouck Heights' Employees,
By: CHARLES J. MILTON, Esq.

This matter is presently before the Court on defendants' various motions to dismiss the complaint and plaintiffs' motion for priority in discovery. The plaintiffs include Philip Robinson, his father and mother. The defendants include various police officers of Hasbrouck Heights, the Borough Attorney, the Borough Magistrate and his Clerk, the Commissioner of the State Department of Institutions and Agencies, the Superintendent of the Bergen Pines County Hospital and the hospital itself.

The present complaint, as amended, alleges violation of 42 U.S.C. Sections 1983 and 1985. The factual allegations stem from two incidents where Philip Robinson was arrested and subsequently placed in Bergen Pines County Hospital pursuant to an emergency commitment procedure set forth in N.J.S.A. (*sic*) 30:4-26.3. As a result of these two episodes plaintiffs seek the convention of a three-Judge Court, pursuant to 28 U.S.C. Section 2281, et seq., to hear and determine the (*sic*) Constitutionality of N.J.S.A. 30:4-26.3 and Article I, Par. 9 of the New Jersey Constitution. Plaintiffs also seek a declaratory judgment declaring N.J.S.A. 30:4-26.3 to be unconstitutionally vague, indefinite and overbroad, and Article I, Paragraph

9 of the New Jersey Constitution to be a denial of due process in that it permits civil commitment without a jury trial.

The Court has had the benefit of oral argument and more than a dozen briefs and affidavits have been submitted by all parties. Defendants have also filed answers to all allegations in the amended complaint. There has been no lack of opportunity for plaintiffs and defendants to present their arguments regarding these motions.

The first cause of action arose as a result of a traffic accident on April 18, 1968, wherein Philip Robinson's car struck a police car in Hasbrouck Heights. As a result of this incident, Robinson was arrested and charged with atrocious assault and battery on the policeman driving the car with which Robinson collided. Robinson alleges this arrest was part of a conspiracy to oppress, harass and ruin all plaintiffs. Once at the police station, plaintiff alleges he was severely beaten, handcuffed and maced (a spray chemical designed to temporarily incapacitate). He was then placed in a cell to await his appearance in Magistrate's Court later that evening. As a result of his actions in that court, Robinson was committed to Bergen Pines Hospital by Judge Harry Chandless, Jr. After fourteen days at Bergen Pines, Robinson was released to Fair Oaks Hospital, a private institution, in Summit, New Jersey, where he remained for fifteen days. While at Bergen Pines, plaintiff alleges he was sexually assaulted, injected with muscle spasm medicine and left to suffer in a small cell.

In May, 1969, Robinson was tried and acquitted of the charge of atrocious assault and battery. In a later ac-

tion, the charge of assault was dismissed but Robinson was convicted of reckless driving.

The second cause of action stems from a second arrest and commitment of Robinson in November, 1969. It appears that Robinson made threats to several local officials and one policeman concerning the death of Robert Kennedy, among other things. As a result of these actions, Robinson was sought on a warrant on November 6, 1969. He was arrested at his home, where he alleges he was beaten and maced, and subjected to an unlawful search and seizure. Once again Judge Chandless, Jr., issued an order of commitment to Bergen Pines Hospital. At the hospital Robinson alleges he was beaten by "unknown attaches" because he refused to take certain drugs. He alleges he was forced to take dangerous drugs which rendered him impotent. After thirteen days of confinement, he was released on a writ of habeas corpus obtained by his father. The warrants issued prior to his second commitment are still outstanding (threat to kill and resisting arrest).

The third and fourth causes of action allege that as a result of these experiences of Philip Robinson, and the accompanying press coverage, his father, Jacob Robinson, suffered in his business and was forced to pay legal fees and other expenses, while Kate Robinson, Philip's mother, is alleged to have suffered a paralytic stroke as a result of her concern and anxiety over her son.

The fifth cause of action seeks the convention of a three-Judge Court to determine the Constitutionality of N.J.S.A. Section 30:4-26.3 and Article I, Paragraph 9 of the New Jersey Constitution. Also sought is a declaratory judgment concerning the Constitutionality of N.J. S.A. 30:4-23.3 and Article I, Paragraph 9, of the New

Jersey Constitution which is alleged to be a denial of due process in violation of the Fourteenth Amendment.

In examining the relationship between the alleged violations of plaintiff's Constitutional rights and the many-named defendants it becomes apparent that plaintiff's reliance upon a theory of conspiracy is ill suited as set forth in the complaint before me. There is some question of the thrust of plaintiff's charges since, read as a whole, they charge a conspiracy to deny plaintiff due process of law. If such is the case, any reliance on Section 1985(3) is misplaced since that statute does not give a cause of action for conspiracy to deny Federally-guaranteed rights generally, including the right to due process of law, in particular. *Joyce* v. *Ferrozzi*, 323 F. 2d 931 (1st Circuit, 1963); *Lombardi* v. *Peace*, 259 F. Supp. 222 (S. D. N. Y., 1966). Plaintiff has asserted an equal protection argument but there are few concrete connections with the statutes, except the allegation that the defendants deliberately conspired to misapply N.J.S.A. 30:4-26.3 to plaintiff Philip Robinson thereby coming within the ambit of Section 1985(3). Upon closer analysis it is readily apparent that the misapplication of New Jersey law stemmed from the mistaken use of a repealed statute, N.J.S.A. 30:4-26.1 and not from a conspiracy to deny plaintiff his rights under the newer law which apparently was unfamiliar to the defendants. (See Par. 12, p. 9; Par. 5, p. 14; Exhibits A, B and C of complaint). Stripped of its conclusory allegations, this complaint fails to allege a conspiracy with sufficient specificity to withstand defendants' motion to dismiss. *Kauffman* v. *Moss*, 420 F. 2d 1270 (3d Cir. 1970); *Valley* v. *Maule*, 297 F. Supp. 958 (D. Conn. 1968); *Weyandt* v. *Mason's Stores, Inc.*, 279 F. Supp. 283 (W. D. Pa. 1968); *Pugliano* v. *Staziak*,

231 F. Supp. 347 (W. D. Pa. 1964), aff'd 3d Cir. 1965, 345 F. 2d 797.

Careful examination of plaintiffs' charges throughout the complaint leads me to the inevitable conclusion that several defendants are entitled to be released from this action because no specific allegations, so necessary under Section 1983, are brought against them. The position of this Circuit, as set forth in *Kauffman* v. *Moss,* supra, at p. 1275, is quite clear:

> ". . . This Court has adopted the rule that complaints in civil rights cases must be specifically pleaded in order to avoid a motion to dismiss."

Plaintiff's first cause of action contains a great many allegations but few specific facts which would support a complaint against any of the defendants. Most of the paragraphs are surrounded by vague allegations of conspiracy. In the best possible light, I can see only two incidents which if proved could support the requested relief. First, there is a charge that Philip Robinson was subjected to excessive force by the Hasbrouck Heights police on April 18, 1969, in the form of a beating and mace attack (see Par. 5, p. 8 of amended complaint). Second, there is a charge that he was subjected to excessive force by way of restraint and sexual assault during his commitment to Bergen Pines County Hospital pursuant to an order of the court issued by Judge Ralph Chandless, Jr. Neither of these charges name the individuals involved and for that reason they also could be dismissed as being broad and conclusory and lacking in facts. *Negrick* v. *Hohn,* 379 F. 2d 213 (3d Cir. 1967). However, I am going to exercise my discretion despite

these failures and permit the plaintiff Philip Robinson to pursue these charges at this stage in order that he may seek through proper discovery to identify more particularly those who are responsible for these alleged brutalities.

Therefore, the motion to dismiss the first cause of action as to defendants Harry Carty, Sr. (ex-Chief of Police), Dr. Rufus Little, Superintendent of Bergen Pines County Hospital and Dr. Lloyd McCorkle, Commissioner of the Department of Institutions and Agencies, will be denied. It will, of course be plaintiff's continued burden to prove that these men were in any way responsible for these alleged acts.

The motion to dismiss, made by Judge Harry Chandless, Jr., Ralph W. Chandless, Borough Attorney, and John Kaphon, Clerk of Municipal Court, will be granted. It is settled law that judges even at this level are immune from prosecution for acts performed within the judicial role regardless of their motives. This immunity extends as well to the prosecutor and court officials acting under judicial authority. (*Sic*) *Pierson* v. *Ray*, 386 U. S. 547 (1967); *Gaito* v. *Ellenbogen*, 425 F. 2d 845 (3d Cir. 1970); *Henig* v. *Odorioso*, 385 F. 2d 491 (3d Cir. 1967); *Bauers* v. *Heisel*, 361 F. 2d 581 (3d Cir. 1966). Plaintiff asserts that Judge Chandless, Jr., invoked the wrong statute in his commitment order, thus losing his immunity. This is not the case. Plaintiffs fail to see the distinction between "clear absence of jurisdiction" and "excess of jurisdiction." Since Municipal Court judges have jurisdiction to commit persons to mental hospitals, N.J.S.A. 30:4-26.3, failure to do it properly does not destroy their jurisdiction over the subject matter. See, *Bauers* v. *Heisel*, supra.

The motion to dismiss as to the first cause of action, made by Bergen Pines County Hospital, will be granted because the hospital is not a "person" within the meaning of Section 1983.

The motion of all other policemen and ex-policemen of the Borough of Hasbrouck Heights as to the first cause of action will also be granted because the complaint fails to allege sufficient facts as to these men to state a claim upon which relief can be granted. Even though I am keeping the administrative officials in the action, I cannot at the same time justify holding these defendant policemen who are not specifically linked with the actionable incidents.

The second cause of action is similar to the first in that it is filled with broad conclusory allegations of conspiracy and brutality. However, there are three allegations which the plaintiff, Philip Robinson, will be allowed to pursue since they set forth a claim upon which relief can be granted. First, there is an alleged illegal search and seizure which took place on November 6, 1969 (see par. 4, p. 13 of amended complaint). Second, there is the allegation of excessive force and police brutality which is briefly set forth in plaintiff's narrative of his arrest on November 6, 1969. Third, there is a charge that Robinson was beaten by unknown "attaches" at Bergen Pines County Hospital for his refusal to take certain drugs. As to the first and second charges, plaintiff names defendants Noonan, Carty, Jr., Van Houten, Baker, Jr., Dates, Worster, Werner, and Bischoff. These men are directed to remain in the action and their motion to dismiss as to the second cause of action is denied.

Defendants McCorkle and Little will also defend against these charges and their motion to dismiss as to this cause second cause of action is denied.

I have carefully considered the affidavits of the above-named defendant policemen and while I am denying their motion to dismiss I do recognize their right to assert a defense of good faith and probable cause at the proper time. See, *Pierson* v. *Ray*, 386 U. S. 547, 557 (1966).

The motions of all other defendants to dismiss the second cause of action will be granted for the same reasons as set forth in my analysis of the first cause of action.

The motions of all defendants to dismiss the third and fourth causes of action will be granted because the plaintiffs have failed to establish any claim for which relief can be granted under Section 1983 or Section 1985. Again plaintiff must assert specific denials of Constitutional guarantees as between the named plaintiff and defendants. Philip Robinson's parents' claims of physical and emotional distress because of his plight are not actionable under Section 1983 or Section 1985.

The first cause of action seeks the convention of a three-Judge Court pursuant to 28 U.S.C. Section 2281 and Section 2284 so that the Constitutionality of N.J.S.A. 30:4-26.3 and Article I, Par. 9 of the New Jersey Constitution can be tested. This application as presently drawn should be dismissed since it fails to seek injunctive relief, a prerequisite for the convention of a three-Judge Court. 28 U.S.C. Section 2281. *Bailey* v. *Patterson*, 369 U. S. 31 (1962); *Norton* v. *Campbell*, 359 F. 2d 608 (10th Cir. 1966); *U. S. ex rel. Watkins* v. *Commonwealth of Pennsylvania*, 214 F. Supp. 913 (W. D. Pa. 1963).

However, in the spirit of liberality in which Fed. R. Civ. P. 15(a) is interpreted, I will permit plaintiffs to amend their complaint to set forth the requisite prayers for relief.

Plaintiff argues that he is entitled to a three-Judge Court because there is a present controversy between plaintiff and defendants and there are substantial Federal questions in issue. As to the first argument. I am in agreement. Philip Robinson's two prior commitments and the outstanding warrants for his arrest are sufficient to demonstrate that he may well be committed a third time to Bergen Pines County Hospital. See, *Fhagen* v. *Miller*, 306 F. Supp. 634 (S. D. N. Y. 1969). The "substantial Federal question" issue presents a more difficult decision. Plaintiffs' argument concerning N.J.S.A. 30:4-26.3 (See Appendix I) falls into three categories. First, they argue that there is an unconstitutional denial of counsel, second, an unconstitutional denial of trial by jury and, third, they argue that there are various flaws in the statute which I shall style as a denial of due process.

I find that the third argument, based on a denial of due process, raises a substantial Federal question. My concern rests with the possible remedies available to test the reasonableness of the detention once the person has been committed. While there are undoubtedly Constitutional justifications for a summary commitment of insane persons for a temporary period, once inside the institution the summary process of arriving at the facts favoring release or confinement must not end. Defendants argue that a writ of habeas corpus is available to provide early release. I find such reliance on the "Great Writ" improper since its origin and use are in no way attributable

to the defendants or the statute in question. See, *Fhagen* v. *Miller*, supra, at P. 638.

Plaintiffs' argument concerning Art. I, Par. 9, of the New Jersey Constitution is based solely on that provision which permits the Legislature to authorize the trial of the issue of mental incompetency without a jury. (See Appendix II)

Plaintiff argues essentially that since commitment to a mental institution deprives a person of his freedom, albeit temporarily in this case, that it is a criminal penalty, thus the Sixth Amendment right to a jury trial cannot be disturbed. Plaintiff has cited no authority for the proposition that this proceeding is criminal rather than civil, yet the distinction is crucial. The Sixth Amendment applies only to criminal proceedings. *U. S.* v. *Zucker*, 161 U. S. 475 (1896); *Hannah* v. *Larche*, 363 U. S. 420 (1959); *Alshausen* v. *Commissioner of Internal Revenue*, C. A. 9, 1960, 273 (*sic*) F. 2d 23, cert. denied 363 U. S. 820, rehearing denied 364 U. S. 855. Plaintiff places great emphasis on the fact that he was committed after he had been arrested on a criminal charge, thus inferring that the commitment is a criminal remedy. I find this reasoning spurious since the statutory procedure can be invoked against anyone believed to be dangerous as a result of a mental disease regardless of whether that person is involved in a prior criminal charge. The case law which does exist on this subject clearly indicates that insanity hearings and commitments are civil in nature. *Barry* v. *Hall*, 98 F. 2d 222, 225 (D. C. Cir. 1938); *State* v. *Owen*, 12 N. E. 2d 1944, (*sic*) 1948 (1937); *Reagan* v. *Powell*, 53 S. E. 580 (1906). Furthermore, plaintiff can gain no advantage by reference to the first clause of Art. I, Par. 9 of the New Jersey

Constitution ("the right of trial by jury shall remain inviolate") since New Jersey courts have interpreted this to mean that the right exists only in cases where there was a right to a jury at the time of the adoption of the Constitution. *Stizza* v. *Essex County Juvenile and Domestic Relations Court*, 132 N. J. L. 406, 408-9 (E. & A. 1944). In *Duncan* v. *State of Louisiana*, 391 U. S. 145, 160 (1968) the Court made it clear that even in criminal cases a jury is not an indispensable part of every trial, and in tracing the origin of our jury system to common law practice the Court further found justification for simplified judicial procedures which in the interests of time and cost made no provision for trial by jury. Plaintiffs' arguments fare no better when they assert that due process requires a jury trial in civil cases. As one court correctly stated:

> ". . . It should be noted that the Fourteenth Amendment does not impose a Constitutional obligation upon the States to provide trial by jury in civil cases in general and in cases involving the issue of insanity in particular. Cf. Payle v. Duffy, 334 U. S. 431, 438-439 (1948); Palko v. State of Connecticut, 302 U. S. 319 (1937); Nobles v. State of Georgia, 168 U. S. 398 (1937)." *United States* v. *Wolfe*, 232 F. Supp. 85, 97 (S.D.N.Y. 1964).

For these reasons, I find that plaintiffs have failed to set forth a substantial Federal question regarding the Constitutionality of Art. I, Par. 9, of the New Jersey Constitution, and I therefore deny their motion to convene a three-Judge Court to hear that issue. *Bailey* v. *Patterson*, 369 U. S. 31 (1962); *Ex parte Poresky*, 290 U. S. 30 (1934).

Plaintiffs also seeks to obtain priority in discovery despite the fact that defendants have already served notices upon plaintiffs for discovery. The well settled rule of law is that priority goes to the party first serving notice of examination, unless the opposing party can show some special circumstances compelling a different order of discovery. *Boxer* v. *Smith, Kline & French Laboratories,* 43 F.R.D. 25 (S.D.N.Y. 1967); *Prodear, S.A.* v. *Robin International* (*sic*) *Cinerama Corp.,* 32 F.R.D. 434 (*sic*) (S.D.N.Y. 1963); *Independent Productions Corp. Leow's Inc.,* 148 F. Supp. 460 (S.D.N.Y. 1957); *Mell* v. *Minkowitz,* 13 F.R.D. 25 (S.D.N.Y. 1952). An examination of the "special circumstances" reveals that they have been found only in very large cases usually involving nationwide conspiracies. I find that the present case does not present any such special circumstances requiring deviation from the traditional methods of procedure.

In furtherance of this opinion, I instruct counsel to prepare and submit an amended complaint in conformity with the decisions reached herein. Counsel is further instructed to pay strict attention to *Fed. R. Civ. P.* 8(a) (2) which states that a complaint shall contain ". . . a short and plain statement of the claim showing that the pleader is entitled to relief . . ."

Opinion of Three Judge Court

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CIVIL ACTION No. 1501-69

PHILIP A. ROBINSON,

Plaintiff,

vs.

DR. LLOYD W. MCCORKLE, *et al.*,

Defendants.

Appearances:

FRANKEL & FRANKEL, ESQS.
By: LEOPOLD FRANKEL, ESQ.
Attorneys for Plaintiff

GEORGE F. KUGLER, ESQ.
Attorney General of New Jersey
By: JOSEPH T. MALONEY, ESQ.
Deputy Attorney General
Attorneys for Defendant McCorkle

HEIN, SMITH, MOONEY & BEREZIN, ESQS.
By: LAWRENCE D. SMITH, ESQ.
Attorneys for Defendant Little

MILTON, KEANE & DE BONA, ESQS.
By: WILLIAM TUOHEY, ESQ.
Attorneys for Employees and Officials,
Hasbrouck Heights

Before:

McLAUGHLIN, Circuit Judge,
WHIPPLE and LACEY, District Judges

PER CURIAM.

This action seeks a Declaratory Judgment that N.J.S.A. 30:4-26.3[1] is unconstitutional as well as an injunction re-

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[1] N.J.S.A. 30:4-26.3 provides:

"The board of chosen freeholders of every county in this State shall designate one or more mental hospitals, as defined in this chapter as hospitals to which a magistrate or judge of any court upon application by a police official as set forth herein may issue an order for an examination or for temporary hospitalization for purposes of observation, examination and treatment. The board of chosen freeholders shall make provision for the proper care and maintenance of such persons so examined and hospitalized.

The constables and police officers in the several townships, cities, and other municipalities shall be authorized to apprehend any person whose behavior suggests the existence of a mental illness, who shall on inspection be deemed to be dangerous to the public and they shall immediately take such person or persons so apprehended before the nearest county district court or municipal court which shall in a summary way inquire and determine whether an order for temporary hospitalization for purposes of observation, examination and treatment until discharged or removed therefrom as herein provided shall be issued.

(Footnote continued on following page)

straining its enforcement. A three judge court, pursuant to 28 U.S.C.A. § 2281, was convened to hear the matter. The primary issue is whether there is an "actual controversy" under the Federal Declaratory Judgment Act, 28 U.S.C. § 2201.

(Footnote continued from preceding page)

An order for temporary hospitalization for purposes of observation, examination and treatment may be issued by a magistrate or judge of any court upon application by a police official and upon proof by him of the existence of the following circumstances: that upon ascertaining the available facts, the police official has concluded that the behavior of the person is such as to constitute a peril to life, person or property and further that the person's behavior suggests the existence of a mental illness, that he had made inquiry as to the person's next-of-kin or friend and had found that either none were available or that they were unwilling to apply for admission for the person; that he had made inquiry to determine whether a practicing physician had examined or would examine the person; that if a physician has, in fact, examined or could examine the person, the physician has confirmed the need for further examination, observation and treatment. An order for an examination at a mental hospital may be made in the absence of a medical examination if the court finds that no physician is able or willing to conduct an examination into the patient's condition.

The aforesaid order when filed with the admitting physician of the hospital and upon his certification of the necessity for hospitalization shall be the warrant and authority for the admission and detention of the person for purposes of observation, examination and treatment for a temporary period not exceeding 15 days from date thereof, and the cost of such hospitalization shall be paid in the same manner as is provided in this Title for patients admitted or committed to mental hospitals."

The complaint reveals that on April 18, 1968 plaintiff, while driving his automobile, rammed into the rear of a police car. The manner of the collision[2] caused the patrolman involved to arrest plaintiff. Several hours after the arrest the plaintiff, Philip Robinson, was brought before a local magistrate who determined, pursuant to the statute presently under attack, that he was a person of unsound mind and dangerous to the public. Accordingly, he was committed to the Bergen Pines County Hospital so that his mental condition could be professionally evaluated. On November 6, 1969 plaintiff was again arrested on an unrelated charge and, pursuant to the same statute, re-committed to the Bergen Pines Hospital.

Plaintiff contends that he has a realistic fear of commitment a third time thus creating an "actual controversy." He points to the past fact of two commitments coupled with the present fact that four warrants are presently outstanding for his arrest. Furthermore, plaintiff contends that as the result of a conspiracy to harass and ridicule him he lives under constant fear that sometime in the future the commitment procedure will again be repeated.

Before proceeding to the issue of justiciability it is necessary, factually speaking, to separate the wheat from the chaff. None of the arrest warrants alleged to be outstanding are pertinent.[3] Three of them were mooted when

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[2] While it is a question of proof, it appears as if plaintiff intentionally rammed over and over again into the rear of the police car.

[3] Counsel for neither side were able to enlighten this Court on the present status of the arrest warrants. Because we felt the issue of justiciability hinged in part on the warrants, the Court contacted the office of the Bergen County Prosecutor. The letter received in response to our request be and is hereby made a part of the record.

grand juries found that the facts underlying each did not support the return of an indictment. Although the facts supporting the fourth served as the basis for an indictment; since he has been arraigned and trial of the cause is imminent that warrant is likewise moot. We further believe that plaintiff's trepidations flowing from the alleged conspiracy lack substance. His last commitment occurred approximately two and one-half years ago. During that span of time the "conspirators" might have executed on one or all of the arrest warrants following which the temporary commitment procedures could have been activated. The fact these matters were pursued through the grand jury indicates that Robinson's fear of re-commitment as a result of any conspiracy is more illusory than real.

Counsel for plaintiff has offered little, if any assistance in resolving the issue of justiciability. He erroneously asserts that *Zwickler* v. *Koota*, 389 U. S. 241 (1967), is supportive of his cause. What counsel should have done is devoted a little further time to a study of that entire litigation. In the first *Zwickler*, supra, at 255, the Court remanded the matter to the district court "* * * to decide whether an injunction will be 'necessary or appropriate' should appellant's prayer for declaratory relief prevail. We express no view whatever with respect to the appropriateness of declaratory relief *in the circumstances of this case* * * *." (emphasis added). Whether counsel's failure to discuss the second *Zwickler* is intentional or not, it is certainly inexcusable. As will be apparent from what follows, we believe the second *Zwickler* to be dispositive of the justiciability question.

There is no reason to restate in detail the familiar principles of law applicable to the issue of justiciability. *See, McCahill* v. *Borough of Fox Chapel*, 438 F. 2d 213

(3d Cir. 1971). Suffice it to say that federal courts do not render opinions unless there are "actual" controversies. An "actual controversy" is one that has "sufficient immediacy and reality." *Golden* v. *Zwickler*, 394 U. S. 103, 108 (1969). Judicial fiat has carved out two outer boundaries within which courts should decide questions of justiciability. At one end of the spectrum is the rule that a person need not wait until actual prosecution or enforcement of the statute in order for there to be an "actual controversy" since the "requisite necessity can exist prior to any actual prosecution * * *." *Poe* v. *Ullman*, 367 U. S. 497, 535 (1961) (dissenting opinion J. Harlan); *Lake Carriers' Assn.* v. *MacMullen*, —— U. S. —— (1972); 40 U. S. L. W. 4569 (May 30, 1972); *Evers* v. *Dwyer*, 358 U. S. 202 (1958); *Railway Mail Assn.* v. *Corsi*, 326 U. S. 88, 93 (1945). At the other end of the spectrum, however, is the precept that a person can only challenge what he deems to be an unconstitutional statute if he has a reasonable belief that it will be enforced against him. *United Public Workers* v. *Mitchell*, 330 U. S. 75 (1947); *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, 460-62 (1945). As always, this case seems to fall within the gray area. That plaintiff is presently free does not automatically mandate a finding of non-justiciability. Nevertheless, it must still appear that Robinson's threat of re-commitment under the statute is more real than hypothetical.

It is clear that realities of the present rather than events of the past is the proper temporal standard for determining justiciability. *Golden* v. *Zwickler*, supra, at 108. This is not to say, however, that events of the past, standing alone, can never be so severe as to create a

reasonable present threat. See, *Fhagen* v. *Miller*, 306 F. Supp. 634 (S. D. N. Y. 1969).[4] However, we do not consider the past facts in this case, standing alone, sufficient to create a real apprehension of re-commitment. Once again, however, events of the past can transform present facts, which standing alone, pose only a hypothetical threat into a real threat. Nevertheless, there are no present facts in this case which can be affected by the past facts. Faced as we are with nothing more than past prosecutions under the statute which, in the circumstances of this case do not create any real present apprehensions, we are constrained to hold that no "actual controversy" is presented. *Golden* v. *Zwickler*, 394 U. S. 103 (1969); *see also, Sellers* v. *Regents of University of California*, 432 F. 2d 493 (9th Cir. 1970), *cert. denied*, 401 U. S. 981 (1971). *Compare, Fhagen* v. *Miller*, 306 F. Supp. 634 (S. D. N. Y. 1969).

Counsel for defendants shall submit an appropriate order in conformity with the preceding dismissing the third cause of action of plaintiff's complaint.

(s) GERALD MCLAUGHLIN
Circuit Judge

(s) LAWRENCE A. WHIPPLE
District Judge

(s) FREDERICK B. LACEY
District Judge

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[4] In *Fhagen* the plaintiff had been committed four previous times under New York's emergency commitment statute, the most recent of which was six months preceding the filing of the opinion. Furthermore, Fhagen had sought habeas relief while committed which efforts were apparently thwarted by state authorities. Although it is not clear, the *Fhagen* Court may also have found that there was some present facts in addition to the past facts which substantiated plaintiff's allegation of "constant apprehension."

Constitutional Provisions Involved

Amendment I

Freedom of religion, speech and press; peaceful assemblage; petition of grievances

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment IV

Searches and seizures

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any

criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

Jury trial for crimes, and procedural rights

In all criminal prosecution, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment IX

Construction of enumerated rights

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment XIV

§ 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they

reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Federal Statutes Involved

28:§ 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy. June 25, 1948, c. 646, 62 Stat. 928.

28:§ 1343. Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or

privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote. June 25, 1948, c. 646, 62 Stat. 932; Sept. 3, 1954, c. 1263, § 42, 68 Stat. 1241; Sept. 9, 1957, Pub. L. 85-315, Part III, § 121, 71 Stat. 637.

42:§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

R.S. § 1979.

Federal Statutes Involved

42:§ 1984. Same; review of proceedings

All cases arising under the provisions of this Act in the courts of the United States shall be reviewable by the Supreme Court of the United States, without regard to the sum in controversy, under the same provisions and regulations as are provided by law for the review of other causes in said court.

Mar. 1, 1875, c. 114, § 5, 18 Stat. 337.

42:§ 1985. Conspiracy to interfere with civil rights—Preventing officer from performing duties

(1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder or impede him in the discharge of his official duties;

OBSTRUCTING JUSTICE; INTIMIDATING PARTY, WITNESS, OR JUROR

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter

pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit jurors in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

DEPRIVING PERSONS OF RIGHTS OR PRIVILEGES

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United

States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

R.S. § 1980.

New Jersey Statutes Involved

30:4-16. Liability in law action

No action at law shall lie against any officer or employee or member of the state board or members of the several boards of managers, for admitting, receiving, keeping, detaining or transferring or discharging as provided by this title or directed by any order made in accordance with this title, any person coming to an institution or non-institutional agency on his own application, or on the application of his friends or relatives, or by order of a judge or court of this state, but such application or order, or certified copy thereof, shall be sufficient warrant and authority for the admission, keeping, detention, transfer, discharge or reasonable care, treatment, management and control of any patient or inmate received or committed according to the terms of this title.

30:4-26.1 Places for temporary confinment of lunatics pending determination of insanity and legal settlement; arrest; summary hearing

The board of freeholders of every county in this State shall provide some safe and convenient place or places in which lunatics or person of unsound mind who may be considered dangerous to the public may be temporarily confined until proper inquiry can be made touching their insanity or unsoundness of mind and legal settlement as now provided by law, and shall make provision for the proper care and maintenance of such persons so confined until their lunacy and places of legal settlement shall be determined. Where any city of the first class in any such county maintains and operates a municipal hospital containing facilities for custody and care of persons of un-

sound mind and the proper city authorities consent thereto, the board of freeholders of such county may designate such municipal hospital as a place for the temporary confinement of such lunatics or persons of unsound mind if they are at the time resident in such city. Such temporay confinement shall not exceed the period of ten days unless the same shall be extended as hereinafter provided. In case no order shall be made for the removal of such lunatic to a lunatic asylum within such period of ten days, such lunatic shall be discharged from such temporary confinement unless the County Court shall, by order, extend such period of confinement. The County Court shall also have power, as in its judgment it may deem proper, by written order, to transfer any such lunatic or person of unsound mind from one place of confinement to another place of confinement so designated.

All lunatics so temporarily confined shall be under the custody, control and direction of such officer as shall be designated for that purpose by the board of chosen freeholders of the several counties, except that where any such lunatic shall be thus temporarily confined in any municipal hospital as herein authorized, such lunatic shall be under the custody, control and direction of the medical director or other head officer of such institution.

The constables and police officers in the several townships, cities and other municipalities shall be authorized to apprehend any lunatic person of unsound mind, who shall on inspection be deemed to be dangerous to the public, and they shall immediately take such person or persons so apprehended before the nearest county district court or municipal court, which shall in a summary way inquire and determine whether such person or persons

is or are of unsound mind and dangerous to the public, and if so found, the said municipal court shall forthwith commit such person or persons to the custody of the person in charge of such place of temporary confinement, until discharged or removed therefrom as herein provided. As amended L.1941, c. 353, p. 924, § 1; L.1953, c. 29, p. 506, § 5.

30:4-16, 30:4-26.1 Repealed. L.1965, c. 59, § 92

Effective date, see note under § 30:1-12.

Construction of L.1965, c. 59, repealing these sections, see note under § 30:1-12.

See, now, § 30:4-26.3.

30:4-26.3 Places for examination or temporary hospitalization; arrest; summary hearing; court order

The board of chosen freeholders of every county in this State shall designate one or more mental hospitals, as defined in this chapter as hospitals to which a magistrate or judge of any court upon application by a police official as set forth herein may issue an order for an examination or for temporary hospitalization for purposes of observation, examination and treatment. The board of chosen freeholders shall make provision for the proper care and maintenance of such persons so examined or hospitalized.

The constables and police officers in the several townships, cities, and other municipalities shall be authorized to apprehend any persons whose behavior suggests the existence of a mental illness, who shall on inspection be

deemed to be dangerous to the public and they shall immediately take such person or persons so apprehended before the nearest county district court or municipal court which shall in a summary way inquire and determine whether an order for temporary hospitalization for purposes of observation, examination and treatment until discharged or removed therefrom as herein provided shall be issued.

An order for temporary hospitalization for purposes of observation, examination and treatment may be issued by a magistrate or judge of any court upon application by a police official and upon proof by him of the existence of the following circumstances: that upon ascertaining the available facts, the police official has concluded that the behavior of the person is such as to constitute a peril to life, person or property and further that the person's behavior suggests the existence of a mental illness, that he had made inquiry as to the person's next-of-kin or friend and had found that either none were available or that they were unwilling to apply for admission for the person; that he had made inquiry to determine whether a practicing physician had examined or would examine the person; that if a physician has, in fact, examined or could examine the person, the physician has confirmed the need for further examination, observation and treatment. An order for examination at a mental hospital may be made in the absence of a medical examination if the court finds that no physician is able or willing to conduct an examination into the patient's condition.

The aforesaid order when filed with the admitting physician of the hospital and upon his certification of the necessity for hospitalization shall be the warrant and authority

for the admission and detention of the person for purposes of observation, examination and treatment for a temporary period not exceeding 15 days from date thereof, and the cost of such hospitalization shall be paid in the same manner as is provided in this Title for patients admitted or committed to mental hospitals. L. 1965, c. 59, § 21.

30:4-30. Contents of certificate or written statement

Every certificate or written statement of a practicing physician shall set forth the date of the making of the personal examination of the subject of the action, which must be made in every case by the physician signing the certificate or written statement not more than 10 days prior to the admission of such person to the hospital and in Class A cases not more than 10 days prior to the date of the commencement of the action.

Every certificate or signed statment shall contain the following information: name and address of physician, a report of the physician's medical findings concerning the person whose admission or detention is sought; the date of the latest examination of the patient by the physician; the physician's relationship, if any, to the person for whom application is being made; the physician's staff appointment, if any, to the mental hospital in which care is sought; and the number and issuing State of the physician's valid license to practice medicine.

Each certificate or signed statement shall set forth any additional facts and circumstances upon which the judgment of such physician is based, and shall include a precise personal description sufficient to identify the patient, and previous mental illness if any, and shall set forth that

the condition of the patient is such as to require care and treatment in a mental hospital and such other information as may be required to be furnished. As amended L. 1965 c. 59, § 25.

Federal Rules of Civil Procedure

Rule 8. General Rules of Pleading.

(a) CLAIMS FOR RELIEF. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

Rule 12. Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on Pleadings.

(c) MOTION FOR JUDGMENT ON THE PLEADINGS. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Rule 56. Summary Judgment.

(a) FOR CLAIMANT. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declara-

tory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No.

PHILIP A. ROBINSON, JACOB A. ROBINSON and KATE ROBINSON,

Petitioners,

vs.

DR. LLOYD W. McCORKLE, Commissioner, Individually and as Head of the Department of Institutions and Agencies; DR. RUFUS R. LITTLE, Individually and as Superintendent of Bergen Pines County Hospital; BERGEN PINES COUNTY HOSPITAL; RALPH W. CHANDLESS, Borough Attorney; HARRY H. CHANDLESS, Jr., Municipal Magistrate; JOHN KAPHON, Clerk, Municipal Court; ARTHUR H. VAN HOUTEN, Chief of Police; CAPT. WILLIAM D. NOONAN; SGT. HOWARD R. BAKER, Jr.; SGT. EUGENE F. DATES; SGT. GIRARD K. DOMMENGE; PTL. PETER A. BRUINOOGE; PTL. BRUCE H. WERNER; SGT. HARRY P. CARTY, Jr.; PTL. DONALD E. WORSTER; PTL. WILLIAM H. BISCHOFF; Ex-Chief HARRY P. CARTY, Sr.; Ex-PTL. JOHN W. RUROEDE, Jr., Individually and as Police Officers,

Respondents.

ERRATA

Page 10, ¶11., line 3 should read correctly:

> . . . . If a school district can be sued in a civil rights case, where only the form of the relief was left to be determined, so can a hospital. *Tinker* v. *De Moines Community School District*, 393 U. S. 503 (1969): . . .

Respectfully submitted,

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LEOPOLD FRANKEL,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-576

PHILIP A. ROBINSON, JACOB A. ROBINSON and KATE ROBINSON,

Petitioners,

vs.

DR. LLOYD W. McCORKLE, Commissioner, Individually and as Head of the Department of Institutions and Agencies; DR. RUFUS R. LITTLE, Individually and as Superintendent of Bergen Pines County Hospital; BERGEN PINES COUNTY HOSPITAL; RALPH W. CHANDLESS, Borough Attorney; HARRY H. CHANDLESS, JR., Municipal Magistrate; JOHN KAPHON, Clerk, Municipal Court; ARTHUR H. VAN HOUTEN, Chief of Police; CAPT. WILLIAM D. NOONAN; SGT. HOWARD R. BAKER, JR.; SGT. EUGENE F. DATES; SGT. GIRARD K. DOMMENGE; PTL. PETER A. BRUINOOGE; PTL. BRUCE H. WERNER; SGT. HARRY P. CARTY, JR.; PTL. DONALD E. WORSTER; PTL. WILLIAM H. BISCHOFF; Ex-Chief HARRY P. CARTY, SR.; Ex-PTL. JOHN W. RUROEDE, JR., Individually and as Police Officers,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

Statement of Issues Presented

1. Whether plaintiff's Amended Complaint states a cause of action against each named defendant cognizable within the jurisdiction of the District Court of the United States?

2. Whether the District Court properly dismissed Plaintiff's Third and Fourth Causes of Action asserted on behalf of the parents of Philip A. Robinson and based on an alleged deprivation of Philip Robinson's civil rights?

Counter-Statement of Procedure and Facts

The instant civil rights action, instituted on behalf of Philip Robinson, and Jacob A. Robinson and Kate Robinson, Philip's parents, was commenced by the filing of a Complaint on December 16, 1969. Named as parties defendants were some twelve police officers of the Borough of Hasbrouck Heights, a municipal magistrate, a municipal prosecutor, a municipal clerk, a municipal attorney, Dr. Lloyd W. McCorkle, Commissioner of the New Jersey Department of Institutions and Agencies, Bergen Pines County Hospital and Dr. Rufus R. Little, Superintendent of Bergen Pines.

Following service of the Complaint each of the defendants moved to dismiss the Complaint, asserting various bases in support of their respective applications, among which were the contentions that the original Complaint failed to state a cause of action as to each defendant sufficient in invoke the jurisdiction of the United States District Court.

Following argument the Court ruled that plaintiff's original Complaint failed to state a cause of action against Dr. Lloyd W. McCorkle, Dr. Rufus R. Little and Bergen

Pines County Hospital. However, prior to entry of an Order of Dismissal in accordance with Judge Whipple's ruling, plaintiff was accorded the right to amend his fifth cause of action to assert additional bases supportive of allegations that the New Jersey commitment statutes were unconstitutional.

Purportedly, acting pursuant to the order of the court, although clearly not in accordance therewith, plaintiffs subsequently filed an amended complaint wherein all of the allegations of all causes of action were amplified and supplemented to embody a potpourri of additional factual contentions.

As amended, plaintiff's complaint asserts four substantive causes of action in addition to plaintiffs' prayer for the empanelment of a three-judge federal court to adjudicate the constitutionality of N.J.S. 30:4-26.3, The New Jersey Temporary Commitment Statute.

Essentially, as gleaned from the amended complaint, plaintiffs' civil rights contentions stem from an automobile accident which occurred on April 18, 1968. As set forth under the designation, "First Cause of Action," plaintiff, Philip Robinson, alleges that on April 18, 1968, he was committed to Bergen Pines following an automobile accident wherein his vehicle allegedly struck the rear of a police car five times. Charged with atrocious assault and battery on a police officer, plaintiff was arrested and taken to the Municipal Magistrate for purpose of fixing bail and affording plaintiff a preliminary hearing. At that time plaintiff appeared to be violent and incoherent and the court was advised by plaintiff's attorney that plaintiff would not permit arrangements to be made for bail. He appeared to be of unsound mind and dangerous and was consequently committed to the Division of Psychi-

atry at Bergen Pines where he was confined for fourteen days, subsequently to be released to Fair Oaks Hospital where he voluntarily committed himself.

On April 22, 1968, pursuant to request made, Bergen Pines advised Magistrate Chandless of its findings, stating that plaintiff "psychiatrically is a sick man. He is unable to form abstract concepts. His reality orientation is poor and he appears to be hearing voices. These features combined with his behavior in the ward in general leads me to conclude that he is suffering from a schizophrenic illness."

As set forth in plaintiff's first cause of action, plaintiff alleges that while confined to Bergen Pines, he "was strapped to a bed, forcibly injected with muscle spasm medicine, sexually assaulted, rendered immobile and left to suffer in a small cell."

Plaintiff's second cause of action alleges that on November 6, 1969, Philip Robinson was again seized by the Hasbrouck Heights Police on charges of threats to kill and assault and battery and was again committed to Bergen Pines. Plaintiff alleges that during the course of his second confinement "he was placed in a bedless cell and left to deteriorate for a week," and physically assaulted by "unknown attaches" (P21a). Following thirteen days of confinement, plaintiff was transferred to the care of Carrier Clinic in Belle Meade pursuant to an Order of Judge Morris Malech of the Bergen County Superior Court which recited that plaintiff, having appeared in open Court, "has not yet been cured of his condition" "and requires further care and treatment."

The third and fourth causes of action were filed on behalf of the parents of Philip Robinson, Jacob and Kate Robinson. Both counts allege derivative injury and seek

damages resulting from allegedly harmful publicity, notoriety, humiliation, and physical and emotional distress resulting from the plight of their son, Philip.

In light of plaintiff's amended complaint, fraught with additional allegations, it again became necessary for each defendant to move to dismiss the Amended Complaint.

The District Court granted the motion of all defendants to dismiss the first cause of action except as to defendants Harry Carty, Sr., Dr. Rufus R. Little and Dr. Lloyd McCorkle. The court further granted the defendants' motions to dismiss the second cause of action except as to defendants Noonan, Carty, Jr., Van Houten, Baker Jr., Dates, Worster, Werner, Bischoff, Lloyd McCorkle and Rufus R. Little. The Motion of all defendants to dismiss the third and fourth causes of action were granted, the court holding that plaintiffs had failed to allege the deprivation of any constitutional guaranties on behalf of Kate and Jacob Robinson and that the claim of parents for physical and emotional distress is not actionable under 42 U.S.C. §1983 or 1985. The court declined to dismiss plaintiffs' first and second causes of action against Dr. Rufus Little and Dr. Lloyd McCorkle to afford plaintiff an opportunity through pretrial discovery to ascertain and identify those individuals allegedly responsible for asserted brutalities while plaintiff was confined to Bergen Pines.

Considering the Amended Complaint "in the best possible light" Judge Whipple was able to envision two incidents which, if proved, could arguably support a claim for relief against employees of Bergen Pines; i.e., plaintiff's charge that "he was subjected to excessive force by way of restraint and sexual assault during his commitment to Bergen Pines" (P49a) and plaintiff's contention

that he was "beaten by unknown 'attaches' at Bergen Pines County Hospital for his refusal to take certain drugs" (P52a).

From that determination, plaintiff appealed to the Third Circuit Court of Appeals, which court affirmed the Rulings of the District Court in their entirety.

Reason for Denying the Writ of Certiorari

It is submitted that the instant case presents no unusual or important issues to warrant grant of certiorari, nor does plaintiff's brief suggest basis for such relief. The Courts below complied fully with the accepted, proper course of judicial procedure. Replying to each enumerated reason asserted by petitioners, we note the following:

1. This argument, as is true of petitioner's points 2 and 3, was not presented to the Courts below and is without merit. The opinions of the Courts below do not intimate reliance on affidavits.

2. See No. 1.

3. See No. 1.

4. Substantial case law refutes plaintiff's reliance on dissenting opinions emanating from anti-trust litigation, which cases by their very nature present proof problems of vast complexity to pose special considerations not applicable herein. The dismissals entered below were based on clearly established principles of law involving the applicability of 28 U.S.C. Sec. 1983, 1984 and 1985 and the fact the Complaint failed to allege any acts or reveal any improper conduct on the part of certain designated defendants. See, e.g., *Kauffman* v. *Moss*, 420 F. 2d 1270 (3d Cir. 1970); *Weyandt* v. *Mason Stores, Inc.*, 29

F. Supp. 283 (W. D. Pa. 1968); *Negrich* v. *Hahn*, 379 F. 2d 213 (3rd Cir. 1967). Thus, the Court of Appeals found the remaining defendants were the "only defendants having any real connection, through specific acts, with the allegations of the Complaint" (17a). Further, the motion to dismiss did not constitute a motion for summary judgment, but a motion pursuant to Rule 12b attacking the jurisdictional requisites and the sufficiency of the allegations of the Complaint.

5. See No. 4.

6. See No. 4.

7. Substantial case law establishes the propriety of the Court's rulings below. See also No. 4.

8. Petitioner misconstrues the holdings of the Courts below. See also No. 4.

9. The ruling below is in complete accord with established case law.

10. The ruling below is in complete accord with established case law.

11. Even plaintiff agreed in his argument below that a county hospital cannot be sued under Section 1983 unless equitable relief is sought. See e.g. *Monroe* v. *Pape*, 365 U. S. 167 (1961); *Spampinato* v. *M. Brager & Co.*, 270 F. 2d 46 (2nd Cir. 1959). No such relief is sought herein. The Court below, analyzing the decisions relied on by plaintiff, properly held "appellant's arguments are rendered groundless" (17a).

12. See No. 9. The derivative claim of Philip Robinson's parents for physical and emotional distress are clearly not actionable. See *Spampinato*, *supra*.

CONCLUSION

It is respectfully submitted the petition should be denied.

Respectfully submitted,

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Attorneys for Respondents Bergen Pines County Hospital and Dr. Rufus R. Little

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-576

PHILIP A. ROBINSON, JACOB A. ROBINSON and KATE ROBINSON,

Petitioners,

vs.

DR. LLOYD W. McCORKLE, Commissioner, Individually and as Head of the Department of Institutions and Agencies; DR. RUFUS R. LITTLE, Individually and as Superintendent of Bergen Pines County Hospital; BERGEN PINES COUNTY HOSPITAL; RALPH W. CHANDLESS, Borough Attorney; HARRY H. CHANDLESS, JR., Municipal Magistrate; JOHN KAPHON, Clerk, Municipal Court; ARTHUR H. VAN HOUTEN, Chief of Police; CAPT. WILLIAM D. NOONAN; SGT. HOWARD R. BAKER, JR., SGT. EUGENE F. DATES; SGT. GIRARD K. DOMMENGE; PTL. PETER A. BRUINOOGE; PTL. BRUCE H. WERNER; SGT. HARRY P. CARTY, JR.; PTL. DONALD E. WORSTER; PTL. WILLIAM H. BISCHOFF; Ex-Chief HARRY P. CARTY, SR.; Ex-PTL. JOHN W. RUROEDE, JR., Individually and as Police Officers,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION SUBMITTED BY THE EMPLOYEES AND OFFICIALS OF THE BOROUGH OF HASBROUCK HEIGHTS, NEW JERSEY

Preliminary

This Brief is submitted on behalf of 15 separate defendants who are collectively referred to as the Employees and Officials of Hasbrouck Heights, New Jersey. The individuals consist of the Borough Magistrate; the Borough Attorney; the Clerk of the Municipal Court; the present and former Police Chiefs, and certain present and former Police Officers of the Borough, whose names are:

Harry H. Chandless

Ralph W. Chandless

John Kaphon

Arthur Van Houten

Harry P. Carty, Sr.

William D. Noonan

Howard Baker, Jr.

Eugene Dates

Girard Dommenge

Peter Bruinooge

Bruce H. Werner

Harry P. Carty, Jr.

Donald Worster

William Bischoff

John W. Ruroede

Counter-Statement of the Case

This is an action brought under the Civil Rights Act (42 U.S.C. § 1983) and it alleges that Philip Robinson was wrongfully confined on two occasions in the Bergen Pines County Hospital. There are three separate groups of defendants, the first defendant is a group of fifteen individuals known as the Employees and Officials of the Borough of Hasbrouck Heights (Hasbrouck Heights defendants) and they are the parties submitting this brief. The second defendant is Dr. Lloyd W. McCorkle, the Commissioner of the New Jersey Department of Institutions and Agencies and the third defendant is Dr. Rufus R. Little, the Superintendent of Bergen Pines County Hospital together with Bergen Pines County Hospital.

The original complaint was filed on December 17, 1969. On December 24, 1969 Judge Whipple in the District Court, signed an order to show cause requiring the defendants to appear before him on January 5, 1970 and state why they should not be restrained from taking any further action re the commitment of Philip Robinson. This application for a temporary restraint was withdrawn by the Robinson's counsel.

On February 9, 1970 the defendants moved to dismiss the complaint on a number of grounds. In support of their motion the so called Hasbrouck Heights defendants filed lengthy affidavits with the Court. These affidavits were filed in February of 1970. These factual affidavits were before the Court when it entered the order appealed from one year later on February 10, 1971. In the intervening year plaintiff filed no affidavits in reply. The following is a brief factual outline of the case.

On April 18, 1969, plaintiff, Philip Robinson, while operating his motor vehicle on the Boulevard in Hasbrouck

Heights collided with a Borough police car. The officer driving the car, Peter A. Bruinooge, stated his car was struck five times by the plaintiff. At the scene of the accident, plaintiff was arrested by Borough officers Dommenge and Ruroede and taken to Police Headquarters where he was charged with atrocious assault and battery on the person of police officer Bruinooge.

At Police Headquarters, plaintiff was also charged with reckless driving; and as a result of an incident at Police Headquarters two additional police officers charged the plaintiff with assault and battery. In the early evening of April 18, 1968, defendant, Harry H. Chandless, Jr., Judge of the Municipal Court of Hasbrouck Heights, was called to Police Headquarters for the purpose of fixing bail and to afford the plaintiff a preliminary hearing in respect to the charges made against him.

Plaintiff was represented at the hearing by family attorney, Murray Ludmer. At the hearing Philip Robinson appeared violent and incoherent to both magistrate Chandless and attorney Ludmer. After conferring with his client, Mr. Ludmer advised the court that his client would not follow his advice and would not allow bail arrangements to be made.

In light of plaintiff's violent and incoherent conduct before the Municipal Magistrate, his preliminary hearing was not held and he was committed to Bergen Pines County Hospital for the statutory period of observation. Plaintiff's attorney, Mr. Ludmer, was present when said commitment order was signed and made no objection to same. It should also be noted that Philip Robinson's mother and sister were at the jail on the night in question and conferred with attorney Ludmer.

On April 18, 1968 at 9:10 P.M. plaintiff was admitted to Bergen Pines County Hospital in Paramus, New Jer-

sey. Upon admission to the hospital plaintiff was examined by staff psychiatrist Dr. M. Amin. After interviewing plaintiff on the date of his admission and days thereafter, Dr. Amin on April 22, 1968 wrote to Magistrate Chandless stating of the plaintiff that "psychiatrically he is a sick man. He is unable to form abstract concepts. His reality orientation is poor and he appears to be hearing voices. These features combined with his behavior in the ward in general leads me to conclude that he is suffering from a Schizophrenic illness."

After fourteen days confinement plaintiff, Philip Robinson, was released from Bergen Pines Hospital in the custody of his parents and was subsequently admitted to Fair Oaks Hospital, Summit, New Jersey, by his family. Fair Oaks is a private mental institution from which institution plaintiff was discharged fifteen days thereafter.

On April 26, 1968 Attorney Donald R. Conway appeared before Magistrate Chandless of the Hasbrouck Heights Municipal Court and stated that he represented plaintiff, Philip Robinson, and requested copies of the complaints on file against said plaintiff. Said documents were furnished and on July 10, 1968, after having been released from Fair Oaks Hospital plaintiff, Philip Robinson, executed a waiver of preliminary hearing on the charges against him and on July 18, 1968, all of the complaints and papers on file relative to said complaints were forwarded by the Municipal Court to the Bergen County Prosecutor's office. Subsequently, the Bergen County Grand Jury handed down an indictment charging plaintiff, Philip Robinson, with atrocious assault and battery as a result of the automobile accident of April 18, 1968. Commencing on May 27, 1969, trial was held in the Bergen County Court on said indictment before the Honorable Benjamin P. Galanti. On May 29, 1969, the jury in said case brought in a verdict of not guilty.

On September 26, 1969, while police officer Bruce Werner was standing on the corner of Franklin Avenue and the Boulevard in Hasbrouck Heights, Philip Robinson allegedly pulled up to a traffic light and screamed "Werner you bastard, you conspired to kill Senator Kennedy and I am going to get the K.B.G. the Soviet Secret Police to put a bullet in your head." Officer Werner reported this incident to his superiors; Chief Arthur Van Houten of the Hasbrouck Heights Police Department ordered an investigation into the matter together with an examination of any witness to the incident. Said investigation revealed a witness, Mrs. Shirley Kemp, who corroborated the officer's statement.

In light of plaintiff Philip Robinson's past medical problems, Chief Van Houten held the report of Officer Werner, relative to the incident described above, in abeyance. Officer Werner did not file a formal complaint until November 6, 1969.

After the incident of September 29, 1969 involving Officer Werner, plaintiff Philip Robinson did not come in contact with the Hasbrouck Heights Police Department until November 4, 1969 when he approached defendant, Ralph W. Chandless, Borough Attorney for Hasbrouck Heights, and threatened his life. The incident happened in the Methodist Church at Division Avenue in Hasbrouck Heights. Plaintiff Robinson stated to defendant Ralph Chandless "I will kill you and other members of your family as you are members of a group responsible for the death of Robert Kennedy." As a result of this incident, Ralph Chandless filed a complaint against plaintiff Philip Robinson on November 6, 1969.

At approximately 9:00 A.M. on November 6, 1969, Robert I. Rafford, Borough Clerk of Hasbrouck Heights

entered his office to commence his day's work. When Mr. Rafford reached his office at the Municipal Building he found Mayor Imken of Hasbrouck Heights there talking with a Miss Davenport who is a Deputy Clerk for the Borough. Plaintiff Robinson rushed into the office and appeared to flash a silver object in the palm of his hand. The affidavit of Mr. Rafford states that plaintiff Robinson appeared emotionally disturbed. Mayor Imken asked the plaintiff who he was and the man responded in a loud voice, "I am God, I am God, I am God." After this incident plaintiff Robinson left the building and at approximately 9:15 A.M. on November 6, 1969, he approached Hasbrouck Heights Borough Councilman David MacPherson when Mr. MacPherson was coming out of his residence on Washington Place, Hasbrouck Heights. Plaintiff Robinson allegedly grabbed Mr. MacPherson by the coat and threatened to kill him and others as they were responsible for the death of Robert Kennedy. As a result of this incident, David MacPherson signed a complaint against plaintiff Philip Robinson on November 6, 1969.

In light of all of these incidents that transpired on November 4, and the morning hours of November 6, 1969, Chief Van Houten directed Officer Werner to proceed with his complaint against plaintiff Philip Robinson arising out of the incident that occurred on September 29, 1969. The complaint was filed in the Municipal Court on November 6, 1969, and a warrant was issued by the Clerk of the Municipal Court. The complaint alleged that plaintiff Philip Robinson had threatened the life of Police Officer Werner.

In the normal course of procedure the warrant was issued by the Clerk of the Municipal Court and delivered to Sergeant Harry Carty and Captain William Noonan of the Hasbrouck Heights Police Department for service.

Later in the afternoon of November 6, 1969, plaintiff Philip Robinson was located at his home in Hasbrouck Heights. Plaintiff refused to admit the officer's attempting to serve the warrant and actually barricaded himself in his home and threatened to kill anyone who entered. When Chief Van Houten was informed of this action, he joined the other officers at the Robinson home and ordered that no efforts be made to take plaintiff Philip Robinson into custody at the present time and that instead, his attorney, Donald Conway, should be contacted. After attorney Conway arrived on the scene he was allowed to enter the house alone and talk to Philip Robinson; upon his exit he advised the police that Robinson had appeared incoherent and violent and that he was unable to convince him to surrender. It was only after all efforts to peacefully bring Philip into custody had failed that the Hasbrouck Heights Police entered the Robinson residence for the purpose of making an arrest. Robinson forcibly resisted arrest and it was necessary to subdue him. At the time of his arrest he had a six inch knife in his possession.

In view of the incoherent and violent nature of Philip Robinson, the police did nothing relative to the Werner warrant. Philip Robinson was again committed to Bergen Pines County Hospital for psychiatric observation on November 6, 1969, pursuant to the second commitment order which was attached to the complaint.

On November 20, 1969, Philip Robinson's counsel moved a writ of Habeas Corpus in the New Jersey Superior Court, Bergen County, Chancery Division. The Honorable Morris Malech signed an order providing that, inasmuch as Philip Robinson was not yet cured and required further treatment, he was to be placed in the custody of officials of Bergen Pines Hospital or the Bergen

County Sheriff's Department and of Jacob Robinson, his father, and that he was to be transported to the Carrier Clinic, Belle Meade, New Jersey, an institution for mental diseases for further treatment.

All of the facts set forth above were encompassed in affidavits which were filed with Judge Whipple in the District Court in February of 1970, and were part of the Appendix and Supplemental Appendix before the Third Circuit. The trial court entered its order of dismissal as to certain defendants one year later in February, 1971. In the intervening year, plaintiff had filed no affidavits which rebutted or contradicted those filed by the defendants.

REASONS FOR NOT GRANTING THE WRIT OF CERTIORARI

The court was entitled to consider the affidavits filed by defendants in opposition to plaintiff's application for a preliminary injunction.

The First Complaint in this matter (there have been two Amended Complaints) was filed December 17, 1969. On December 24, 1969, Judge Whipple in the United States District Court for the District of New Jersey, signed an Order to Show Cause requiring all defendants to appear before him on January 5, 1970, and state why they should not be enjoined from taking any further action re the commitment of one Philip Robinson. At the same time, defendants cross moved for a dismissal of the complaint and in support of said Motion and in opposition to plaintiffs' request for an injunction they filed certain affidavits. The request for the injunction was ultimately withdrawn by plaintiffs.

It is the position of the Petitioners that the District Court committed error when it considered these affidavits in ruling on a second motion to dismiss filed by the respondents one year after the affidavits had been filed. It is respectfully submitted that Petitioners are wrong for two reasons.

First, the District Court did not consider the affidavits when it dismissed the suit as to certain defendants. The court ruled the action should be dismissed because the Complaint failed to allege specific allegations, as are required, under the Civil Rights Act (42 U.S.C. 1983). The Court's reasoning is set forth in the Appendix particularly page 17a.

The Second reason that Petitioners are in error is that while the Court did not consider the Affidavits on file it would have been perfectly proper for the Court to so consider said documents. Rule 65 (a) (2) of the Federal Rules of Civil Procedure as amended to July 1, 1972, provides in part:

> . . . any evidence received upon an application for a Preliminary Injunction which would be admissible upon the trial on the merits becomes a part of the record on the trial and need not be repeated upon the trial.

The above language was added to the Federal rules by an Amendment that became effective July 1, 1966. Thus the case of *Mead* v. *Randall,* 111 Mich. 268, 69 N. W. 506 (Sup. Ct. 1896) and the treatise of Rose, Federal Jurisdiction and Procedure (4th Edit. 1931) cited by Petitioners pre-date the above rule, Professor Moore in Moore's Federal Practice (2nd Edit. 1972) states in Volume 7 at Section 65.04[5]:

> "Subdivision (a) (2) deals with the preservation of the evidence itself and presupposes that there will be a subsequent trial on the merits. It does not deal with the use of the evidence in an intervening motion for summary judgment. Prior to the addition of subdivision (a) (2), however, it had been held that evidence taken at a hearing on an application for a preliminary injunction could be used, along with the items specified in Rule 56 in disposing of a motion for summary judgment, and there is nothing in Rule 65 that precludes its use."

It should be noted that the case of *Sooner State Dairies, Inc.* v. *Townley's Dairy Co.*, 406 F. 2nd 1328 (10th Cir. 1969) is also cited by Professor Moore in a footnote to the above section. In said case the Tenth Circuit held that a finding based on an interlocutory hearing would not serve as the ground for a final judgment. In the appeal *sub judice* it must be remembered the request for a preliminary injunction was withdrawn by Philip Robinson after the Affidavits in question were filed. It is respectfully submitted that in such circumstances the trial court was free to consider said affidavits or put them aside within its own discretion.

The second point above is presented merely in reply to allegations raised by Petitioners in their Brief. The key point that rebuts all of Petitioners' contentions is that the District Court, as well as the Third Circuit, found that Plaintiff's Complaint failed to allege specific allegations that are necessary under (42 U.S.C.A. § 1983), *Kaufman* v. *Moss*, 420 F. 2nd 1970 (3rd Cir. 1970). Thus, the opinion below does not rest on the affidavits which Petitioner is attempting to raise as a straw man before this court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari to the United States Court of Appeals, for the Third Circuit should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-576

PHILIP A. ROBINSON, JACOB A. ROBINSON and KATE ROBINSON,

Petitioners,

vs.

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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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IN THE

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vs.

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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

A brief in opposition to the petition for certiorari submitted by Bergen Pines County Hospital and Dr. Rufus R. Little has been received by us on November 3, 1972. The only reply required of the petitioners is to refute the statements found on page 6 of their brief, where they submit "Reason(s) for Denying Writ of Certiorari" following the same numbering as petition, under "Reasons for Granting the Writ of Certiorari."

Say the respondents:

> "1. This argument, as is true of petitioner's points 2 and 3, was not presented to the Courts below and is without merit. The opinions of the Courts below do not intimate reliance on affidavits."

Our reply:

1. In his opinion, the district judge stated (see 14a of petition):

> "The Court has had the benefit of oral argument and more than a dozen briefs and affidavits have been submitted by all parties."

Again, on 20a appears this observation by the same judge:

> "I have carefully considered the affidavits of the above-named defendant policemen, etc."

There were no affidavits submitted with the motion to dismiss. Therefore, the only affidavits the Court could have considered were the spent affidavits accompanying motion for injunction.

Hence, respondents' point 1, true also of points 2 and 3, is without merit.

Say the respondents:

> "4. . . . Further the motion to dismiss did not constitute a motion for summary judgment, but a motion pursuant to Rule 12b attacking the jurisdictional requisites and the sufficiency of the allegations of the complaint."

Our reply:

4. The moving papers did not indicate under what rule respondents were moving. The trial judge in letter opinion dated December 14, 1970, 13a, without indicating under what rule he was deciding the motions, merely stated:

> "This matter is presently before the Court on defendants' various motions to dismiss the complaint. . . ."

Nowheres in the remainder of that opinion is there any mention of the rule under which he was dismissing.

Say the respondents:

> "8. Petitioner misconstrues the holdings of the Courts below. See also No. 4 above."

Our reply:

In affirming the erroneous opinion of the district court judge, the opinion of the United States Court of Appeals for the Third Circuit stated, at 6a:

> ". . . The trial judge properly treated the designated motions as motions to dismiss, and measured the allegations of the complaint against the *rule of specificity* of pleading applicable to civil rights actions." (Emphasis ours)

Again, no mention of any Rule of Civil Procedure under which the district judge or the judges of the Court of Appeals were acting—no citation of any cases.

Rule 1 of the Federal Rules of Civil Procedure for the United States District Courts provides:

> ". . . They shall be construed to secure the just, speedy and inexpensive determination of every action."

Civil rights actions are not excepted. Before the adoption of Rule 8(a)(2) of these Rules, critics of the "short and plain statement," among them the Ninth Circuit, wanted the complaint to state more detail which would send pleading back to the old code requirements. See 13 FRD 253. The Advisory Committee rejected the efforts of these critics and of the Ninth Circuit, which had proposed, following the word "statement," "which statement shall contain the facts constituting the cause of action." Special exceptions were urged upon the Committee, such as for antitrust, patent, copyright or other allegedly special types of litigation. They met with the same fate. The only permissible exception made, however, was in Rule 71A dealing with Condemnation of Property where sub. (c)(2) "Contents" sets out specifically what is being claimed and against whom.

The Committee, adopted the "Fair Notice" philosophy of pleading as articulated in *Conley* v. *Gibson* (1957) 355 U.S. 41, 47, where Mr. Justice Black speaking for an unanimous Court, held:

> ". . . the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the

> claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. The illustrative forms appended to the Rules plainly demonstrate this."

The Rule of "Specificity" so strongly urged by the district judge when dismissing the complaint and adopted by the Court of Appeals when affirming the dismissal, has been superseded by Rule 8(a)(2), the "short and plain" statement rule. Now the detailed information about a claim or defense is never given by pleadings, but is available to the parties by the use of deposition and discovery procedure. "Specificity" in pleading, with all deference to the courts urging it, is now dead. See Moore's Federal Practice Rules Pamphlet, District Courts, as amended 1971, p. 404, et seq.

Say the respondents:

> "11. Even plaintiff agreed in his argument below that a county hospital cannot be sued under Section 1983 unless equitable relief is sought."

Our reply:

11. Not so. Our brief to the Third Circuit is to the contrary. On p. 20 we stated:

> "Our own United States District Court in *Porcelli* v. *Titus* (D.C. N.J. 1969) 302 F. Supp. 726, has held that a Board of Education was amenable as a 'person' under Section 1983. In an opinion by Chief Judge Angelli, he held that the Newark Board of

Education is a body corporate which may sue and be sued. N.J.S. 18A:10-1, 18A:11-2."

Respectfully submitted,

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